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No. 94-400

In the Supreme Court of the United States

OCTOBER TERM, 1994

CATERAIR INTERNATIONAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR CATERAIR INTERNATIONAL

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8 pp

TABLE OF AUTHORITIES

PAGE

Cases:

Johns-Manville Sales Corp. v. *NLRB*, 289 NLRB 358 (1988), *enf. den.* 906 F.2d 1428 (10th Cir. 1990) 1

NLRB v. *Curtin Matheson Scientific*, 494 U.S. 775 (1990) 1–2

NLRB v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973) 2

T.L.C. of St. Petersburg, 307 NLRB 605 (1992) 4

Periodicals:

Bureau of National Affairs, Analysis/News and Background Information, 147 LRR 18 (Sept. 5, 1994) 5

Comment, *Confusion Surrounding the Good Faith Doubt Evidentiary Standard Goes Unchecked*, 6 J. L. COMMENTARY 93 (1990) 2

Comment, *The Effect of a Nonpresumption as to Striker Replacements' Union Sentiments on the Good-Faith Doubt Defense*, 52 OHIO STATE L. J. 919 (1991) 2

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ARGUMENT

This Court has never considered the Labor Board's "good-faith doubt" rule in cases of employer withdrawal of recognition from a union. Caterair's petition contends the Board's administration of this standard is biased and unrealistic. Pet. 7.

There can be no real dispute that the Board rejects any circumstantial evidence of "good-faith doubt" and requires a numerical majority composed of "individual employees [having] expressed desires to repudiate the union." *Johns-Manville Sales Corp.* v. *NLRB*, 906 F.2d 1428, 1432 (10th Cir. 1990), *quoting* Chief Justice Rehnquist in *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 798-799

(1990).[1] The actual Board practice of requiring a petition signed by a majority of employees "leaves little if anything of the good-faith doubt rule and effectively collapses it into the proof in fact rule." *Id.* 906 F.2d at 1433.

Although the Board requires the petition to be "presented" to the employer, any proof of employer involvement in the actual solicitation of signatures will be inferred to have fatally "tainted" the petition. This case illustrates the essentially conclusive nature of the Board's inference; there was no direct proof that even one of the 428 signatures was solicited by management.[2] Pet. 8. However, the Board treats cases of coercive union solicitation differently by not inferring "taint" of any unlawfully solicited cards other than those actually signed and never dismisses the union's petition. This disparate treatment exists notwithstanding this Court's requiring the Board's election rules to be "wholly neutral." *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270, 278 (1973).

The Board did not respond to Caterair's challenge to cite a single case where there was *any* supervisory solicitation when the employees were *ever* allowed to vote on whether to retain the union. Instead, its brief in opposition goes to some length to rehash the eight singular in-

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[1]See also, Comment, *The Effect of a Nonpresumption as to Striker Replacements' Union Sentiments on the Good-Faith Doubt Defense,* 52 OHIO STATE L. J. 919, 941-3 (1991); Comment, *Confusion Surrounding the Good Faith Doubt Evidentiary Standard Goes Unchecked,* 6 J. L. COMMENTARY 93, 112 (1990).

[2]Even the Board's statement of the question presented in its opposing brief concedes it will find a withdrawal of recognition unlawful when a company has "actively solicited" for a decertification election among employees. Since there can be no such thing as "passive" solicitation the Board apparently means any solicitation by management is enough to trigger the inference.

stances of solicitation necessarily conceded by Caterair under the substantial evidence rule, (Br. 3-7) and suggests these instances alone support the inference the solicitation "launched" and "orchestrated" by Caterair was "wide-spread and conspicuous." Br. 12. Rhetoric is not, however, a substitute for evidence and analysis. It remains undisputed: not one of the 428 employees who signed the petition claimed any management solicitation and neither the Board nor Court of Appeals found the eight instances of solicitation, standing alone, sufficient to taint the petition.

The Board asserts "the facts of this case" do not present a good-faith doubt issue. It misstates Caterair's argument to be that the proof in fact standard can "be achieved only by polling the employees." Br. 11. Then the Board concludes this case does not involve either an employer poll or "untainted circumstantial evidence of a union's loss of support."[3] Br. 12.

These arguments are simply unresponsive to Caterair's petition. Obviously, Caterair did not conduct a poll because it clearly would have been rejected under the Board's rules. As required by the Board's actual practice, Caterair relied on a decertification petition to show numerical proof, not "circumstantial evidence", the union had lost majority support.

The Board's brief in opposition does not really deny Caterair's argument that the good-faith doubt rule has been

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[3]The Board's contention (Br. 10, 13) that Caterair did not argue these issues before the Court of Appeals is simply incorrect. The company argued vigorously and at length that its conduct could not possibly have tainted the decertification petition. Although Caterair framed the issue before the Court of Appeals in traditional terms of "substantial evidence", this surely cannot prevent it from emphasizing broader policy issues before this Court.

effectively collapsed into the proof in fact standard. The Board tacitly accepts the point by resorting to numbers supposedly showing the union had majority support. Br. 12. Although the Board's argument concedes the analytical point, it does not prove union majority support. That 54% of the employees were having dues deducted from their paychecks at the time of the decertification petition proves nothing in light of the collective bargaining agreement's requiring employees to join the union and pay dues or be fired. J.A. 67. The salient point is 46% of the employees risked discharge by not having dues deducted.[4] Similarly, the fact that 61 employees, out of the 428 who signed the petition in February, supported the strike in June proves nothing when not a single one claimed to have been improperly solicited. If there was any significant management involvement in the decertification effort then some of those 61 would surely have provided some evidence to that effect.

The Board's reliance on numbers that are, at most, weak indicators of union support, proves only that the dispute should have been resolved definitively by an election. Had the employees been allowed to vote in 1991, even allowing for an appropriate notice posting period to remedy what truly was minor employer misconduct, the ensuing strike and lengthy litigation would have been avoided. In the time it has taken to litigate this case, three elections could have been conducted. By uniformly denying employees the right to vote, even in cases of minor em-

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[4]There is no evidence the union was collecting dues by any means other than check-off. It is also noteworthy that the Board holds the refusal of a majority of employees to authorize check-off is not probative evidence of a *lack* of majority support for a union. See, e.g., *T.L.C. of St. Petersburg*, 307 NLRB 605 (1992).

ployer misconduct, the Board effectively imposes unwanted unions on employees.[5]

The Board's effort to distinguish its clearly disparate treatment of unlawful union solicitation underscores the frailty of its position. It asserts that in a case of coercive union solicitation there is "sufficient employee interest" to conduct an election but an employer violation precludes "sufficient untainted employee disaffection" to allow a vote. Br. 14. This is precisely Caterair's point: the Board *always* conducts another certification election, irrespective of a union's misconduct, but *never* allows a decertification vote in cases of minor employer misconduct.

The Board further argues that cases of unlawful union solicitation present a "purely administrative" issue but an employer withdrawal of recognition requires imposition of a bargaining order remedy. Br. 14-15. Again, this is precisely Caterair's point: under the guise of its remedial discretion the Board deprives employees of any opportunity to vote a union out while conducting multiple elections in cases of union misconduct.

Finally, the Board's brief chides Caterair for presenting a "fact bound" argument that substantial evidence does not support the Board's finding of unlawful management solicitation. Br. 15. Actually, Caterair made the somewhat different argument that the undisputed evidence squarely refutes the findings underlying the crucial infer-

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[5]The current Board Chair apparently wants to abandon the majority status concept in all cases. He reportedly advocates imposing a bargaining obligation on an employer whenever "a substantial number of employees, such as 20 percent or 30 percent" indicates a desire for union representation. Remarks of Chair William B. Gould before the Washington State Labor Council, August 22, 1994, reported in BNA, Analysis/News and Background Information, 147 LRR 18 (Sept. 5, 1994).

ence of management solicitation influencing a significant number of signatures.

There was no legitimate basis for a rational decision maker to conclude Caterair's conduct was sufficient to require dismissal of the decertification petition in this case. The Board should not be allowed to stretch its rule preventing an employer from destroying a union's support into a conclusive inference that any employer solicitation must result in the dismissal of a decertification petition.

Respectfully submitted,

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